A **ATUL TRIPATHI v. STATE OF UTTAR PRADESH AND OTHERS**

SUPREME COURT, INDIA
(2014) 9 SUPREME COURT CASES 177
MY EQBAL J
KURIAN JOSEPH J
B [CRIMINAL APPEALS NO: 1516 OF 2014†
WITH NOS. 1517-18‡ OF 2014]
22 JULY 2014

C ***CRIMINAL PROCEDURE:*** *Criminal Procedure Code, 1973 – Ss. 389 and 439 – Involvement of Public Prosecutor – Extent of – Distinction between procedure for consideration of bail under, explained*

CRIMINAL PROCEDURE: *Criminal Procedure Code, 1973 – S. 389(1) first proviso – Mandatory nature of – Conviction in respect of a serious offence punishable with death or life imprisonment or imprisonment for a term not less than 10 yrs – Appellate court to give opportunity to Public Prosecutor for showing cause in writing against such release – Mandatory nature of – Introduction of such stringent provision – Reasons for, explained – Steps to be followed in compliance with S. 389(1) proviso, clarified – Held, service of a copy of the appeal and application for bail on the Public Prosecutor by the appellant convict will not satisfy the requirement of S. 389(1) first proviso – Opportunity to the Public Prosecutor to show cause in writing against release of private respondent life convicts not having been given, bail set aside and matters remanded to High Court for consideration afresh in strict compliance with S. 389(1) first proviso – Penal Code, 1860 – Ss. 302/149, 147, 148 and 120-B – Criminal Law (Amendment) Act, 2013, S. 7 – Words and Phrases – "Opportunity to show cause in writing" – Natural Justice – Audi Alteram Partem – Right to hearing – Reasonable Opportunity/Right of Representation*

Held:

There is a marked difference between the procedure for consideration of bail under Section 439, which is pre-conviction stage and Section 389 CrPC, which is post-conviction stage. In case of Section 439 CrPC, only notice to the Public Prosecutor, unless impractical, has to be given before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or where the punishment for the offence is imprisonment for life; whereas in the case of post-conviction bail under Section 389 CrPC, where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten

I † Arising out of SLP (Crl.) No. 261 of 2013. From the Judgment and Order dated 29-8-2012 in Crl. A. No. 3239 of 2012 passed by the High Court of Judicature of Allahabad

‡ Arising out of SLPs (Crl.) Nos. 262-63 of 2013

years, it is mandatory that the appellate court gives an opportunity to the Public Prosecutor for showing cause in writing against such release. (Paras 11 to 13)

Service of a copy of the appeal and application for bail on the Public Prosecutor by the appellant convict will not satisfy the requirement of the first proviso to Section 389(1) CrPC. The appellate court may even without hearing the Public Prosecutor, decline to grant bail. However, in case the appellate court is inclined to consider the release of the convict on bail, the Public Prosecutor shall be granted an opportunity to show cause in writing as to why the appellant be not released on bail. Such a stringent provision is introduced only to ensure that the court is apprised of all the relevant factors so that the court may consider whether it is an appropriate case for release having regard to the manner in which the crime is committed, gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice-delivery system, etc. Despite such an opportunity being granted to the Public Prosecutor, in case no cause is shown in writing, the appellate court shall record that the State has not filed any objection in writing. This procedure is intended to ensure transparency, to ensure that there is no allegation of collusion and to ensure that the court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post conviction stage. (Para 14)

To sum up the legal position: (1) The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life or for a period of ten years or more, shall first give an opportunity to the Public Prosecutor to show cause in writing against such release; (2) On such opportunity being given, the State is required to file its objections, if any, in writing; (3) In case the Public Prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection had been filed despite the opportunity granted by the court, and (4) The court shall judiciously consider all the relevant factors whether specified in the objections or not, like gravity of offence, nature of the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release. (Paras 15 and 16)

Shyam Narain Pandey v. State of U.P., Criminal Appeal No. 3239 of 2012, order dated 29 8 2012 (All), reversed

Laxmi Narain Pandey v. State of U.P., Criminal Appeal No. 3404 of 2012, order dated 5 9 2012 (All)

Atul Tripathi v. State of U.P., (2014) 9 SCC 177 (F3), referred to

Appeals allowed Y-D/53579/CR

Advocates who appeared in this case:

For the appellant - Ashok Panigrahi, R.N. Tripathi, Santosh Kumar, Ms Ashmi Mohan and Ms Tuleka Mukherjee (for M/s Anuradha & Associates), Advocates

A *For the respondents - R.K. Das and Pramod Swarup, Senior Advocates, [Sibo Sankar Misra, Pareena Swarup, Ameet Singh, Ms Alka Sinha, Anuvrat Sharma and Tuleka Mukherjee (for M/s Anuradha & Associates), Advocates)*

Chronological list of cases cited on page(s):

Atul Tripathi v. State of U.P. (2014) 9 SCC 177 (F3)

B *Laxmi Narain Pandey v. State of U.P.* Criminal Appeal No. 3404 of 2012, order dated 5 9 2012 (All)

Shyam Narain Pandey v. State of U.P. **(reversed)** Criminal Appeal No. 3239 of 2012, order dated 29 8 2012 (All)

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JUDGMENT

Kurian Joseph J:

[1] Leave granted. At the post-conviction stage, whether the appellate court, while considering the release of the convict on bail, should give an opportunity to the Public Prosecutor for showing cause in writing against
D such release where the conviction is on an offence punishable with death or imprisonment for life or for a term not less than ten years, is the issue falling for consideration in these appeals.

[2] All the private respondents have been convicted by the Court of Additional Sessions Judge, Azamgarh under Sections 147, 148 and 149 read
E with Sections 302 and 120-B of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC") and Section 7 of the Criminal Law (Amendment) Act, 2013 and they have been awarded sentence of imprisonment for life with fine. Altogether seven accused have been convicted; however bail is granted only to four.

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[3] The main contention of the appellant is that the procedure contemplated under Section 389(1) first proviso, Criminal Procedure Code has not been complied with while releasing them on bail and, hence, the order[1] passed by the High Court is liable to be set aside.

G **[4]** For the purpose of ready reference, we shall extract the impugned order dated 29-8-2012[1] passed by the High Court, which reads as follows:

> Heard Shri Rajeev Mishra, learned counsel for the appellant as also Shri A.N. Mulla, learned AGA for the State. We have also heard Shri Viresh Mishra, learned Senior Counsel assisted by Shri Rahul Mishra, Advocate
H appearing on behalf of the informant.
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> This appeal shall be heard.
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> Call for lower court record of Sessions Trial Nos. 435, 436 and 437 of 2006 from the Court of Additional Sessions Judge, Court No. 2, Azamgarh, which must be made available in a maximum period of four weeks.

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1. *Shyam Narain Pandey v. State of U.P.*, Criminal Appeal No. 3239 of 2012, order dated 29 8 2012 (All)

As regards the prayer for bail, the submission is that the present appellant Shyam Narain Pandey along with the other convict Laxmi Narain Pandey were alleged in the FIR as also in the evidence that they were sitting in a vehicle and were remonstrating from there, the shots whereupon were fired by three others.

Regard being had to the submissions, let appellant Shyam Narain Pandey be released on bail, during pendency of appeal, on furnishing a bond of Rs 20,000 with two sureties of the like amount each to the satisfaction of the learned Additional Sessions Judge, Court No. 2, Azamgarh in connection with Sessions Trial Nos. 435, 436 and 437 of 2006.

As regards sentence of fine imposed upon the abovenoted appellant, realisation thereof shall remain stayed.
Order date: 29-8-2012

sd/-
Dharnidhar Jha, J.
sd/-
Ashok Pal Singh, J.

Subsequently, in order dated 5-9-2012[2], it was clarified that Laxmi Narayan Pandey is also to be covered by the said order.

[5] In the case of Umesh Kumar Pandey and Ramesh Kumar Pandey, following is the order:

This appeal shall be heard along with Criminal Appeal No. 3239 of 2012 in which we also send for the record of the learned trial court.

Heard Shri Satish Trivedi, learned Senior Counsel appearing for the appellants and Shri Rahul Sharma, learned counsel appearing for the informant as also learned AGA for the State.

As regards the prayer for bail, the submission is that the case of Laxmi Narain Pandey, Appellant 1 was same and similar to that of co-convict Shyam Narain Pandey. As regards the remaining two appellants, namely, Umesh Kumar Pandey and Ramesh Kumar Pandey, the submission is that except that they had also alighted with other accused persons from the Bolero vehicle, there were no further allegations against them.

Regard being had to the submission and evidence, which is discussed in the impugned judgment[1], we direct the release of the appellants, namely, Umesh Kumar Pandey and Ramesh Kumar Pandey on bail, during pendency of the appeal, on furnishing a bond of Rs 20,000 each with two sureties of the like amount each to the satisfaction of the learned Additional Sessions Judge, Court No. 2, Azamgarh in connection with Sessions Trial Nos. 435, 436 and 437 of 2006.

2. *Laxmi Narain Pandey v. State of U.P.*, Criminal Appeal No. 3404 of 2012, order dated 5 9 2012 (All)

1. *Shyam Narain Pandey v. State of U.P.*, Criminal Appeal No. 3239 of 2012, order dated 29 8 2012 (All)

A As regards sentence of fine imposed upon the abovenoted appellant, realisation thereof shall remain stayed till further orders.

Order date: 5-9-2012

[6] Section 389 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") reads as follows:

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389. Suspension of sentence pending the appeal; release of appellant on bail.-(1) Pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond:

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Provided that the appellate court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

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Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.

(2) The power conferred by this section on an appellate court may be exercised also by the High Court in the case of an appeal by a convicted person to a court subordinate thereto.

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(3) Where the convicted person satisfies the court by which he is convicted that he intends to present an appeal, the court shall:

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

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(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail,

order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the appellate court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

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(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

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(emphasis supplied)

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[7] Since the argument is on the faulty procedure adopted by the High Court, on 24-3-2014, this Court directed[3] the respondents to state on affidavit:

> ... as to whether the first proviso to Section 389 CrPC for giving an opportunity to the Public Prosecutor for showing cause in writing against the proposed release of the convicted person on bail was complied with before the impugned bail order was passed by the High Court.

[8] The State has filed an affidavit on 24-4-2014. Para 5 of the affidavit reads as follows:

> That in this regard, it is respectfully submitted, that as per information received, no opportunity for showing cause in writing was provided to the State counsel though the State counsel appeared on the said date. (emphasis supplied)

[9] On behalf of the second respondent, an affidavit has been filed on 12-4-2014 wherein it is stated at Paras 2 and 3 as follows:

> 2. ... In this context it may be stated that Respondents 2 to 4 for challenging the judgment and order of conviction recorded by the trial court gave notice of the appeal to the State counsel on 31-8-2012. The notice consisted of the memo of appeal and the application for bail. Thereupon appeal along with bail application was filed. Giving of earlier notice to the State counsel was in compliance with the requirement of law as provided in Section 389 CrPC to enable the State to have its say in writing on the prayer for bail.
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> 3. That the appeal (Criminal Appeal No. 3404 of 2012) along with bail application was listed on 5-9-2014. The counsel representing State as well as of the complainant, petitioner herein, entered appearance and objected to the respondent's prayer for bail. Upon hearing the counsel of Respondents 2 to 4, State and the complainant, Hon'ble High Court passed the impugned order(s). ... (emphasis supplied)

[10] The learned counsel for the private respondents contends that the appellants had given copies of the appeal and the bail application to the Public Prosecutor and since the Public Prosecutor having been heard on the day when the appeal came up for admission, there is compliance with the first proviso under Section 389(1) CrPC. The Public Prosecutor having appeared in the matter and opposed the application for bail, the statutory requirement of opportunity to show cause has been satisfied.

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3. *Atul Tripathi v. State of U.P.*, (2014) 9 SCC 177 (F3), wherein it was directed:

> These matters be listed on 21-4-2014 along with SLP (C) D. No. 8124 of 2014. In the meanwhile, the respondents will state on affidavit as to whether the first proviso to Section 389 CrPC for giving an opportunity to the Public Prosecutor for showing cause in writing against the proposed release of the convicted person on bail, was complied with before the impugned bail order was passed by the High Court.

[11] The provisos to Section 389 were introduced mainly pursuant to the 154th Report of the Law Commission of India submitted in 1996. The amendments were introduced by Act 25 of 2005 and they have come into effect from 23-6-2006. The Law Commission recommended for addition of two provisos. The recommendation reads as follows:

> 47. Two provisos to sub-section (1) of Section 389 of the Code be added to the effect that the appellate court would give notice to the prosecution before releasing a convicted person on bail, if he was convicted of an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and also to enable the prosecution to move an application for cancellation of such bail granted by the appellate court.

However, in the Bill, a further modification was suggested to the effect that the Public Prosecutor be given an opportunity to show cause in writing against the release and, thus, the provisos have found place under Section 389(1) CrPC.

[12] Section 389 comes under Chapter XXIX CrPC dealing with appeals. Section 439 CrPC coming under Chapter XXXIII CrPC provides for special powers to High Court or Court of Session regarding bail for an accused. Section 439(1) also has a proviso. Section 439 reads as follows:

> 439. Special powers of High Court or Court of Session regarding bail.–(1) A High Court or Court of Session may direct:
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> (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;
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> (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:
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> Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.
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> (2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody. (emphasis supplied)

[13] It may be seen that there is a marked difference between the procedure for consideration of bail under Section 439, which is pre-conviction stage and Section 389 CrPC, which is post-conviction stage. In case of Section 439, the Code provides that only notice to the Public Prosecutor unless impractical

be given before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or where the punishment for the offence is imprisonment for life; whereas in the case of post-conviction bail under Section 389 CrPC, where the conviction in respect of a serious offence having punishment with death or life imprisonment or imprisonment for a term not less than ten years, it is mandatory that the appellate court gives an opportunity to the Public Prosecutor for showing cause in writing against such release.

[14] Service of a copy of the appeal and application for bail on the Public Prosecutor by the appellant will not satisfy the requirement of the first proviso to Section 389(1) CrPC. The appellate court may even without hearing the Public Prosecutor, decline to grant bail. However, in case the appellate court is inclined to consider the release of the convict on bail, the Public Prosecutor shall be granted an opportunity to show cause in writing as to why the appellant be not released on bail. Such a stringent provision is introduced only to ensure that the court is apprised of all the relevant factors so that the court may consider whether it is an appropriate case for release having regard to the manner in which the crime is committed, gravity of the offence, age, criminal antecedents of the convict, impact on public confidence in the justice-delivery system, etc. Despite such an opportunity being granted to the Public Prosecutor, in case no cause is shown in writing, the appellate court shall record that the State has not filed any objection in writing. This procedure is intended to ensure transparency, to ensure that there is no allegation of collusion and to ensure that the court is properly assisted by the State with true and correct facts with regard to the relevant considerations for grant of bail in respect of serious offences, at the post-conviction stage.

[15] To sum up the legal position:

[15.1] The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life or for a period of ten years or more, shall first give an opportunity to the Public Prosecutor to show cause in writing against such release.

[15.2] On such opportunity being given, the State is required to file its objections, if any, in writing.

[15.3] In case the Public Prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection had been filed despite the opportunity granted by the court.

[15.4] The court shall judiciously consider all the relevant factors whether specified in the objections or not, like gravity of offence, nature of the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release.

A **[16]** Admittedly, no such opportunity was granted to the State as contemplated under the first proviso of Section 389(1) CrPC in these appeals. Therefore, the impugned orders to the extent of release of the private respondents on bail are set aside. The High Court shall consider the matters afresh. Needless to say that Shyam Narayan Pandey, Respondent 2 in
B Criminal Appeal No. 1516 of 2014 arising out of SLP (Criminal) No. 261 of 2013 and Laxmi Narayan Pandey, Respondent 2, Umesh Kumar Pandey, Respondent 3 and Ramesh Kumar Pandey, Respondent 4 in Criminal Appeals Nos. 1517-18 of 2014 arising out of SLPs (Criminal) Nos. 262-63 of 2013 shall surrender before the trial court within three weeks and, if not,
C they shall be taken into custody. Thereafter, the High Court shall consider afresh their applications for bail, after following the procedure as per first proviso to Section 389(1) CrPC as explained above, expeditiously.

[17] The appeals are allowed as above.

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